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SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWOMBLY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court allow the government to engage in pre-trial discovery depositions in a criminal matter without regard to Fed. R. Crim. P. 15(a)?

2. May a federal court allow the government to engage in pre-trial discovery depositions in a criminal matter pursuant to Fed. R. Crim. P. 15(a)?

PARTIES

In the Court below, petitioner Twombly, Inc.'s[1] co-defendants-appellants were General Electric Company, Schenectady Turbine Services, Ltd., Robert Naples, Hoyt P. Steele and Charles Mothon. The respondent was the United States of America.

On August 6, 1982 co-defendant-appellant Charles Mothon filed a Petition for a Writ of Certiorari under Docket No. 82-231. Petitioner Twombly, Inc. hereby adopts his Petition and Appendix.

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1. Petitioner Twombly, Inc. has no parent company, subsidiaries other than wholly-owned subsidiaries, or affiliates.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TWOMBLY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Twombly, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 16, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is not yet reported officially. A copy of the slip opinion is set forth in the Mothon Appendix as Appendix A at page 1a.

That aspect of the October 1, 1980 unreported oral opinion of the United States District Court for the Dis-

trict of New Jersey pertaining to the Rule 15 issue is set forth in the Mothon Appendix as Appendix C at page 36a.

No opinion was rendered by the United States District Court for the District of New Jersey in connection with its granting of the Government's Application, pursuant to Rule 57 (b), Fed. R. Crim. P., and Rule 28(b), Fed. R. Civ. P., for the Court to Request International Judicial Assistance on May 9, 1980.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 16, 1982. [Copy set forth at page 2a.] A timely-filed petition for rehearing was denied on July 15, 1982. [The order of the Court of Appeals denying the Petition for Rehearing is set forth at page 3a.] This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 15(a) of the Federal Rules of Criminal Procedure provides:

> (a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other mate-

rial not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

STATEMENT OF THE CASE

On March 13, 1980, a federal Grand Jury sitting in Newark, New Jersey returned a one-count indictment against petitioner Twombly, Inc. charging the company with transferring $94,455.50 by wire from a New Jersey bank to a bank in Bermuda on or about May 28, 1977, as part of a scheme to bribe a Puerto Rican official, and thereafter transferring another $377,765.98 from which a bribe was to be paid to a Puerto Rican official. At the arraignment on March 24, 1980, the Government's counsel stated that it intended to return a superseding indictment

> possibly around the 22nd of May this year which would charge Mr. Vernon Twombly personally—he is the President of Twombly, Inc.—and others, possibly the General Electric Company,

and further

> In light of the fact that we are continuing our investigations and that we do intend to return a superseding indictment, I would request that any date this Court would now set for trial will be set subsequent to our last Grand Jury date in Newark which is the 22nd of May.

On April 18, 1980 the Government filed an Application for the Court to Request International Judicial As-

sistance, pursuant to Rule 57(b), Fed. R. Crim. P. and Rule 28(b), Fed. R. Civ. P., seeking authority to obtain the use of subpoena power in Bermuda in order that six depositions could be taken in Bermuda on May 14, 1980. Later, a second application was filed which was substantially identical to the first except that it sought depositions in Bermuda of those persons on June 11, 1980 "to obtain evidence to be used in a criminal trial on July 14, 1980 before this Court in the above captioned matter." (10a, 11a)

The Government's Application contained a precis of what the Government hoped to prove at trial and admitted

> Our present evidence is insufficient to establish whether or not a bribe was actually paid to Velasquez Toro. Since Bermuda law does not permit us to obtain banking or other records, the tracing of the funds ends with funds going to the TEE account at the Bermuda National Bank. (9a)[2]

Shortly thereafter the Government filed a Motion to Continue Trial Date, in which it stated:

> At the scheduled arraignment before this court on March 24, 1980, Ms. Barbara A. Corprew, appearing on behalf of the Government, advised the Court and defense counsel that the grand jury investigation was not completed since the Government ex-

2. The Government neither admitted nor disclosed (1) that a Bermuda court would not honor a Request for International Judicial Assistance in a criminal matter unless there is an outstanding indictment, (2) that the law of Bermuda expressly forbids the taking of such depositions for discovery purposes, and (3) that on April 10, 1980 the government had made an *ex parte* motion to the Bermuda courts for the very same evidence now sought in the Request for International Judicial Assistance and that the Bermuda Court had denied this *ex parte* request.

pected to return a superceding indictment charging additional defendants well before any trial date that the Court would conceivably set in the indicted matter. As a result of these representations, the Court set a tentative trial date with the knowledge that the case would not proceed to trial.

2. Despite the Government's efforts to obtain Letters Rogatory assistance from the Bermudian authorities in advance of the scheduled trial date, it recently became obvious that commission proceedings, pursuant to the Letters Rogatory request, could not feasibly be set until June 11, 12, and 13. Consequently, we now request that the trial be rescheduled for July 14, 1980. (14a, 15a)

Petitioner opposed the Government's Application. The District Court, without rendering an opinion, granted the Application and signed the Request for International Judicial Assistance on May 9, 1980. (10a)

In June and August 1980 the Government proceeded to take the depositions and obtain documents as authorized by the District Court's Request. The success of the discovery mission resulted in the Government's return before the same Grand Jury sitting in Newark, New Jersey and the presentation of additional evidence to that Grand Jury.

On September 4, 1980, the Grand Jury returned a seven-count indictment against petitioner Twombly, Inc. and its co-defendants General Electric Company ("GE"), Schenectady Turbine Services, Ltd., Robert Naples, Hoyt P. Steele and Charles Mothon. The indictment charged, in essence, that the three individuals and the three corporations conspired and carried out a scheme lasting from May, 1973 to June 30, 1976 to pay a bribe to one Carlos Velasquez Toro, an official of a

publicly-owned utility, the Puerto Rico Water Resources Authority ("PRWRA"), in return for Toro's use of his influence to obtain for GE a contract to construct a power generating plant for the PRWRA in Puerto Rico. The indictments were consolidated for purposes of trial, and were brought to trial jointly before the Honorable Anne E. Thompson and a jury. On February 11, 1981, the jury found petitioner guilty on the one-count indictment and all defendants guilty on all but Count Six of the seven-count indictment.

On June 16, 1982 the Court of Appeals for the Third Circuit issued its opinion and judgment: (1) affirming the convictions of petitioner Twombly, Inc. on the one-count indictment; (2) reversing the conviction of Robert Naples on all counts of the second indictment; (3) reversing the convictions under Counts 2, 3 and 5 of the second indictment for all of the other defendants on the grounds that the District Court should have entered directed verdicts of acquittal on these counts; and (4) reversing the convictions of the defendants on Counts 1, 4 and 7 and remanding for new trial on these counts.

Following the return of the second indictment on September 4, 1980, the Government filed a motion on September 22, 1980 to take the depositions of certain foreign nationals residing in Bermuda, Canada and England pursuant to Fed. R. Crim. P. 15(a) and a Request for International Judicial Assistance pursuant to Fed. R. Crim. P. 57(b) and Fed. R. Civ. P. 28(b). Petitioner Twombly, Inc. hereby adopts the Petition and Appendix filed by Charles Mothon, Docket No. 82-231, as to this issue.

REASONS FOR GRANTING THE WRIT

The Third Circuit has sanctioned the use by the Government of depositions in a criminal matter for discovery purposes in direct conflict with the Eighth and Ninth Circuits, presenting an important question of Federal law that should be resolved by this Court.

The applicable law governing depositions by the Government in a criminal case is Fed. R. Crim. P. 15, under which the Government has the burden as the moving party to establish that "due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved." As the Notes of the Advisory Committee on the 1975 Amendment to Rule 15 explain, the Rule's "principal objective is the preservation of evidence for use at trial. *It is not to provide a method of pretrial discovery* . . . " (emphasis added) Both the Eighth and Ninth Circuits have held that Rule 15 may not be utilized to obtain discovery. See *United States v. Rich*, 580 F.2d 929, 933-934 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978); *United States v. Adcock*, 558 F.2d 397, 406 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977). See also *United States v. Mann*, 590 F.2d 361, 365 (1st Cir. 1978); *United States v. Steffes*, 35 F.R.D. 24 (D. Mont. 1964).

In the instant case it is clear that the return of the one-count indictment against petitioner alone on March 13, 1981 was designed to enable the Government to continue its investigation in Bermuda. Having been thwarted in its post-indictment attempt to do so *ex parte*, it applied to the District Court, not pursuant to Rule 15, but pursuant to Rule 57(b), Fed. R. Crim. P. and Rule 28(b), Fed. R. Civ. P. Disavowing any reliance upon Rule 15, and in fact arguing that Rule 15 didn't apply,[3]

3. Subsequently, after the District Court's Request for International Judicial Assistance was safely in Bermuda, and the Bermuda

the Government made no attempt in the District Court to make any showing as required by the cases construing Rule 15, such as *United States v. Wilson*, 601 F.2d 95 (3d Cir. 1979); *United States v. Mitchell*, 385 F. Supp. 1190 (D.D.C. 1973), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Bello*, 532 F.2d 422, 423 (5th Cir. 1976); *United States v. Ausmeier*, 5 F.R.D. 395, 396 (E.D.N.Y. 1946). In its Application for the Court to Request International Judicial Assistance, and in its other representations made to the District Court, it clearly stated its goal to be investigatory, that is, discovery, and not the preservation of evidence for use at trial. The Government admittedly had no intention of proceeding to trial against petitioner alone on the one-count indictment.

The District Court, in authorizing the Government's discovery mission, and the Third Circuit, in approving same, have given the Government an investigation [discovery] tool not contemplated by the drafters of Rule 15 and in direct conflict with the Eighth and Ninth Circuits.

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courts were proceeding in compliance therewith, the Government conceded that Rule 15 applied.

CONCLUSION

The sanctioning by the Third Circuit and the District Court of the use by the Government of depositions in a criminal case for discovery purposes was incorrect as a matter of law, presents an important question of federal law that should be resolved by this Court, and merits the granting of this petition to review the judgment of the Third Circuit.

Respectfully submitted,

/s/ Donald Horowitz
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DATED: September 13, 1982